Filed 9/25/12 P. v. Woods CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. JACKIE RAY WOODS, Defendant and Appellant.	C069762 (Super. Ct. No. SF115432A)

A jury convicted defendant Jackie Ray Woods of rape of an incompetent person (Pen. Code, § 261, subd. (a)(1); count 1)[1] and forcible rape (§ 261, subd. (a)(2); count 2). The jury found defendant had two prior convictions for forcible rape, pleaded as prior sexual offenses (§§ 667.61, subd. (d)(1), 667.71) and as prior serious and violent felonies (§§ 667, subds. (b)-(i), 1170.12). Defendant was sentenced to state prison on count 2 for 25 years to life. An identical term on count 1 was stayed

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[1] Further statutory references are to the Penal Code unless otherwise indicated.

pursuant to section 654.[2] The trial court ordered no visitation between defendant and the victim. (§ 1202.05.)

Defendant contends, and the Attorney General concedes, one rape conviction must be reversed because both counts pertain to the same act against the same victim. The parties further agree the no-visitation order was unauthorized and must be stricken. We modify the judgment.

FACTS

Prosecution Case-in-Chief

Defendant had two prior separate convictions of forcible rape.

The current facts are not at issue and may be summarized as follows. K.M. lives in a two-bedroom home in Stockton. She has a daughter, C.M., who was born in June 1992. When C.M. was about six years old, K.M. lost custody of her.

Shortly before her 18th birthday, C.M. began having visitations with K.M. She lived in a foster home during the week and spent weekends with K.M. As an adult, C.M. suffers from depression, mood problems, and personality problems. She has a history of treatment for posttraumatic stress disorder and attention deficit hyperactivity disorder with psychotic

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[2] Defendant was awarded conduct credit pursuant to section 2933.1. The relevant 2010 amendment to section 2933 does not entitle him to additional credit because, inter alia, he was committed for a serious felony. (Former § 2933, subd. (e)(3) [as amended by Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010].)

features. She functions at the level of about a 10- to 12-year-old girl.

K.M. met defendant in June 2010. Her attorney had asked whether defendant could stay at her home for a few days. K.M. agreed to let him stay for two or three days.

Defendant brought a bed, television, videocassette recorder, clothing, and pornography into the house. He moved into the southeast bedroom and told K.M. that he needed to stay about a week. K.M. agreed to the longer stay. She told him that her daughter would be visiting, that the daughter was "childish in nature," and that she needed supervision. Very quickly, defendant and K.M. began a romantic and sexual relationship.

Defendant met C.M. on Saturday, July 3, 2010, when she arrived for a visit. Defendant joined K.M. and C.M. while they were doing some gardening in the yard. The trio began throwing mud at one another in a "mud fight." After reentering the house, the trio began tickling and spanking one another in a playful manner. That evening, defendant went to bed in the southeast bedroom, K.M. retired to the southwest bedroom, and C.M. fell asleep on a sofa in the living room.

The next evening, July 4, there was gunfire outside the house, so K.M. thought everyone should "get together in one room." Defendant, K.M. and C.M. spent the night in the southeast bedroom. After C.M. fell asleep on couch cushions that had been placed on the floor, defendant and K.M. had sex.

The morning of July 5, defendant said he would take care of C.M., meaning supervise her. K.M., who was very groggy, agreed. Defendant took C.M. to the living room and then to the kitchen. K.M. fell back asleep. In the dining room, defendant and C.M. played a game called "truth or dare." During the game, defendant pulled down C.M.'s top and sucked on her nipples. Then C.M. went to the southwest bedroom to go to sleep. When she awoke, her pants and panties were off and defendant was on top of her. He forced his penis inside her and told her not to scream or he would "smack" her. When they heard that K.M. was awake, defendant got off of C.M., who rolled over off the bed to cover herself.

After waking up, K.M. walked through the house to the southwest bedroom. She saw defendant emerge from the bedroom with an erection and a wet spot on his boxer briefs. K.M. also found C.M., crouched on the floor between the bed and the dresser, naked from the waist down. Before K.M. could say something, defendant said, "I didn't do anything," and C.M. said nothing had happened. K.M. screamed at defendant and pushed him. At first, defendant said he "didn't touch" C.M. Later, he said that C.M. "came on to" him "asking for sex." K.M. took C.M. to the bathroom. C.M.'s vaginal area appeared wet and swollen, as though she had had sex.

Defense

Defendant rested without presenting evidence or testimony.

DISCUSSION

I

Defendant contends, and the Attorney General correctly concedes, he was improperly convicted of both rape of an incompetent person (§ 261, subd. (a)(1)) and forcible rape (§ 261, subd. (a)(2)), based upon a single act of sexual intercourse.

The California Supreme Court long ago explained that, "[u]nder [section 261], but one punishable offense of rape results from a single act of intercourse, although that act may be accomplished under more than one of the conditions or circumstances specified in the foregoing subdivisions. These subdivisions merely define the circumstances under which an act of intercourse may be deemed an act of rape; they are not to be construed as creating several offenses of rape based upon that single act. This conclusion finds support in section 263 of the Penal Code which provides that 'The essential guilt of rape consists in the outrage to the person and the feelings of the female.' The victim was not doubly outraged, once because she was forcibly attacked and once because she was under 18 years of age. There was but a single outrage and offense. [Citations.]" (*People v. Craig* (1941) 17 Cal.2d 453, 455.) The court concluded, "only one punishable offense of rape results from a single act of intercourse, though it may be chargeable in separate counts when accomplished under the varying circumstances specified in the subdivisions of section 261 of the Penal Code." (*Id.* at p. 458.)

In this case, the trial court allowed multiple rape convictions to remain but applied section 654 to stay the punishment for count 1, rape of an incompetent person. However, by its terms, section 654, subdivision (a) applies where the "act or omission . . . is punishable in different ways *by different provisions of law*." (Italics added.) Here, in contrast, the two rape convictions are punishable *in the same way* by *the same provision of law*: section 261. The parties correctly agree section 654 does not apply in this situation. (*People v. Correa* (2012) 54 Cal.4th 331.)

II

Defendant contends, and the Attorney General correctly concedes, the trial court's no-visitation order was unauthorized and must be stricken.

Background

The trial court issued "supplemental orders at sentencing for sexual assault and/or child abuse cases." Among them was an order that, "[p]ursuant to . . . section 1202.05, there shall be no visitation between the Defendant and the victim . . . ." The court ordered the District Attorney to furnish a copy of the order to C.M. and her parents.[3]

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[3] The Attorney General characterizes the order as an "order prohibiting [defendant] from contacting [the victim]." However, on its face, the order purports to regulate *visitation*, which is within the control of the adult victim not the incarcerated defendant.

Analysis

Section 1202.05 provides in relevant part: "Whenever a person is sentenced to the state prison . . . for violating Section 261 . . . , and the victim of one or more of those offenses is *a child under the age of 18 years*, the court shall prohibit all visitation between the defendant and the child victim." (§ 1202.05, subd. (a), italics added.)

In this case, the evidence showed that C.M. was an adult at the time of defendant's crime. Thus, section 1202.05 did not apply, and the no-contact order was unauthorized.

DISPOSITION

The judgment is modified as follows: the count 1 conviction is reversed and the trial court is directed to enter dismissal of that count. The no-visitation order is stricken. As so modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation.

NICHOLSON, Acting P. J.

We concur:

BUTZ, J.

MAURO, J.